United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1210

To be argued by
MARTIN M. BAXTER

United States Court of Appeals

For the Second Circuit

GIOVANNI GENTILE,

Plaintiff-Appellant,

against

KONINKLIJKE NEDERLANDSCHE STOOMBOOT MAATSCHAPPIJ N. V.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Preliminary Statement

This is an appeal by Giovanni Gentile, the above-named plaintiff-appellant (hereinafter "plaintiff") from the order and judgment of the United States District Court for the Southern District of New York (Levet, D.J.) which granted the motion of Koninklijke Nederlandsche Stoomboot Maatschappij N. V., the defendant-appellee (hereinafter "shipowner") dismissing plaintiff's action at the close of the plaintiff's case for failure to prove a cause of action.

Statement of the Issues Presented by the Appeal

The question presented by this appeal is whether plaintiff-longshoreman made out a cause of action based on un-

seaworthiness of shipowner's vessel, by reason of a concealed hole or space in the cargo covered by separation paper into which plaintiff fell injuring himself.

The Facts

Plaintiff was a longshoreman employed by Northeast Terminal & Stevedoring Company on May 22, 1970 as a holdman aboard the M.V. AMMON berthed at the 39th Street Pier in Brooklyn (16a, 35a).

Plaintiff went aboard at 8:00 A.M. and worked in #3 hatch loading mixed cargo brought aboard by pallets using the ship's winches. Between 12 noon and 1:00 P.M. his gang took their luncheon break (17a).

Upon returning to #3 hatch at 1:00 P.M. plaintiff and the other seven holdmen continued loading and at about 2:30 or 3:00 P.M. covered the square of the hatch with separation paper (20a, 21a), the plaintiff and his partner placing the paper on the inshore, starboard side of the square and others of the holdmen placing paper down on the offshore, port side of the square (19a, 20a) and the square of the hatch was completely covered with separation paper about 5 minutes thereafter (21a).

Following the laying of the separation paper which divides the cargo by ports of discharge, plaintiff and his co-workers loaded cargo and stowed the same on top of the separation paper (21a).

While plaintiff was taking cargo to stow it, his left leg went through the separation paper in the middle of the square into a hole or space between cargo underneath and sustained injury (22a).

On cross-examination plaintiff testified that in stowing the general or mixed cargo, he left holes or spaces between

the cases (25a), you always have some spaces (27a, 30a, 31a), you can't close up all the spaces (31a), we were just finishing up (30a).

The separation paper was 2½ to 3 feet wide and the length varied as needed and was placed over spaces in cargo (31a).

His left foot made a 9 to 10 inch hole in the paper and his leg went down about three feet (33a).

The Testimony of the Witness, Lepore.

Mr. Lepore testified that on the day of the accident he was employed by Northeast Terminal and Stevedoring Company as the hatch boss in charge of 18 men and the holdmen including the plaintiff went aboard the M.V. AMMON berthed at the 39th Street Pier in Brooklyn at 8:00 A.M. and loaded general cargo in #3 hatch (34a, 35a).

In the afternoon after lunch (35a) he was standing on the main deck (37a) supervising the men (36a) working in the square of #3 hatch (37a) when he saw the plaintiff fall between the cases (35a).

He was standing one foot from the hatch (35a) and the men were working in the upper 'tween deck about four feet down from the coaming, the hatch coaming being 3½ to 4 feet above the main deck (37a). Plaintiff's head was over the coaming and about 5 or 6 feet away from Mr. Lepore (40a) when he saw plaintiff's foot go through the separation paper and go down (43a).

On cross-examination he testified the separation paper was 3½ to 4 feet wide but he did not remember the lengths. He was loading general cargo—cartons, boxes, all mixed and different sizes (45a).

He told the holdmen not to leave spaces between the cargo so as to make a floor so that other cargo can be stowed on top of it in turn forming the next or higher floor making a wall to wall stow (45a). When specifically asked whether there was any spaces between the cargo in #3 hatch on the day in question, he testified that he did not see any (46a).

He ordered the holdmen to lay separation paper all over the hatch, all over the cargo including the square of the hatch (46a).

The Testimony of the Witness, Vincenzo Gentile.

Vincenzo Gentile testified that he was the plaintiff's brother, was a member of Lepore's gang working #3 hatch on the day in question, was a deckman working the winches loading the cargo into the ship by means of pallets (48a, 49a).

He operated the winches from a steel platform about eight feet above the main deck and the plaintiff was about 12 or 13 feet from him when he saw that plaintiff had fallen with his foot in the hole (49a, 50a).

On cross-examination he testified that he saw the plaintiff and the other holdmen lay separation paper which was 4 feet wide and 12 or 14 feet long. He saw the hole in the separation paper made by the plaintiff's foot going through it and it was about 7 or 8 inches in size (51a, 52a).

Argument.

The undisputed facts are that plaintiff and his gang loaded mixed cargo into #3 hatch from 8 to 12 noon and upon returning from lunch at 1:00 P.M. continued loading general cargo until 2:30 or 3:00 P.M. when the hatch

boss Lepore ordered them to lay separation paper on the cargo in the entire hatch so as to separate different ports of discharge.

The hatch boss instructed the men not to leave spaces between the cargo but on the contrary wanted a wall to wall floor to stow more cargo on each tier. In supervising his men he did not notice any spaces in the cargo prior to covering the same with separation paper or prior to plaintiff's accident.

The plaintiff testified that he left spaces between the cargo because it did not fit perfectly case to case. Indeed, he stated you always have spaces.

Upon the conclusion of plaintiff's case, Judge Levet seized upon plaintiff's testimony as to the existence of spaces between the cargo and that you always have these spaces and on this basis dismissed plaintiff's complaint citing *Usner* and *Nuzzo, infra.*

It should be noted that at no time did shipowner's counsel nor the Court ask plaintiff what size spaces were being left by him in stowing the cargo. Judge Levet took a very active and at times confusing part in the questioning of witnesses. Yet there is no evidence in the record regarding the size of the spaces left by plaintiff.

The only evidence was that the concealed hole into which plaintiff fell was big enough for his foot to go through the paper and his leg to go down about 3 feet.

The dismissal by Judge Levet must necessarily be based on his own speculation that the spaces left by plaintiff were sizable and similar to the one into which he fell.

Neither a jury nor a judge can speculate regarding something that is not in evidence. Here, the record is silent as to the size of the spaces left by plaintiff and such could

just as easily be infinitesimal as otherwise. Absent evidence as to size, Judge Levet relied on speculation to dismiss.

Furthermore, plaintiff worked on the inshore, starboard side and laid separation paper on the inshore, starboard side of the square. However, he fell into a concealed hole in the middle of the square, an area he neither stowed nor covered with separation paper. Thus, whatever he may have done elsewhere in the hatch, his stowing of the cargo or covering with separation paper was not the proximate cause of his accident.

POINT I

As a matter of law a jury question was presented whether plaintiff's accident occurred as a result of unseaworthiness.

Unseaworthiness is a condition of the ship which proximately causes injuries to a seaman or one performing a seaman's duties and it is irrelevant to the shipowner's liability how that condition came into being.

> *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494, 1971 A. M. C. 277.

Indeed, it is irrelevant whether shipowner had complete control over the instrumentality causing the injury, *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, 1954 A. M. C. 860, or whether the shipowner had actual or constructive knowledge of the condition. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 1960 A. M. C. 1503.

In *Siderewicz* v. *Enso-Gutzeit O/Y*, 453 F2d 1094, 1972 A. M. C. 326, this court cited *Usner, supra,* as stating that a ship's unseaworthy condition could arise from an improper method of loading her cargo.

In *Kyzar* v. *Vale Do Ri Doce Navegacai,* 464 F2d 295, 1972 A. M. C. 1661 (5 Cir.) reh. and reh. *en banc* den.; cert. den. 410 U. S 929, the court quoted from its opinion in *Robinson* v. *Showa Kaiun K.K.,* 451 F2d 688, 1972 A. M. C. 799 wherein it stated at pages 690 and 801, respectively:

> "Usner distinguished 'instantaneous' unseaworthiness from what might be called 'connected' unseaworthiness. A longshoreman or one of his fellows might engage in a *congeries* of negligent acts that are of such a character or that continue for such a length of time that they become related to the status of the vessel. That *congeries* of acts might create a 'condition' of unseaworthiness, so that an individual act of negligence within or after the *congeries* might give rise to liability under the unseaworthiness doctrine."

In *Venable* v. *A/S Det Forenede Dampskibsselskab,* 399 F2d 347, 1968 A. M. C. 1437 (4 Cir.) cert. den. 404 U. S. 1059, the court stated that *Mitchell, supra,* answered affirmatively the question of whether a shipowner is responsible for an unseaworthy condition created by a member of the crew or a longshoreman working on board.

There longshoremen were loading the vessel and a longshoreman while working on a surface of previously stowed hogsheads of tobacco and engaged in stowing the next tier, stepped backward into an empty space between hogsheads and fell injuring himself.

The court held that it is the shipowner's duty to furnish all seamen and longshoremen a safe place to work and that this obligation extends to the stowage where men perform the loading and unloading operations. And then went on to say that the fact that spaces are neces-

sarily present between the hogsheads and that longshoremen knowingly subject themselves to the hazard, are not mitigating factors. Recognizing that these men are constrained to accept, without critical examination and without protest, working conditions and appliances as commanded by their superior officers, the Court has declared repeatedly that they are not deemed to assume the risk of unseaworthiness:

> "Certainly the shipowner was cognizant of the fact that longshoremen would be forced, during loading and unloading operations, to work on the stowed hogsheads. It therefore became his absolute duty to make the surface safe for that type of work."

The court then concluded that the question for the jury was simply whether the stowage was safe for its intended use as a working surface for men engaged in the loading or unloading of the hogsheads.

This circuit has held that the absolute and non-delegable duty of the shipowner to provide a seaworthy vessel includes the duty to provide proper stowage, the shipowner being liable for improper stowage created by the longshoremen themselves.

Rich v. *Ellerman & Bucknall, S.S. Co., Ltd.*, 278 F2d 704, 1960 A. M. C. 1580 (2 Cir.) and *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F2d 297, 1958 A. M. C. 1819 (2 Cir.).

In *Strachan Shipping Company* v. *Alexander*, 311 F2d 385, 1962 A. M. C. 1026 (5 Cir.), the court found that the bales of cotton could not be stowed airtight and although the longshoremen created the hole or space in the cargo

into which plaintiff fell, the ship nevertheless was unseaworthy because of said condition of the stow.

Indeed, this court in *Nuzzo* v. *Rederi A/S Wallenco*, 304 F2d 506, 1962 A. M. C. 1871 (2 Cir.) took pains to point out that no holes between the bundles existed under the hatch where the longshoremen were continuously working nor were the holes concealed (pages 1875 and 1877 of 1962 A. M. C.).

In the instant case the hole between cases existed in the square of the hatch where the longshoremen were continuously working and was completely concealed by separation paper.

It is submitted that the court below committed reversible error as a matter of law in taking the question of unseaworthiness from the jury.

CONCLUSION

By reason of the foregoing it is respectfully submitted that the order and judgment appealed from herein should be reversed.

Respectfully submitted,

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the within

day of , 19

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